STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 21, 2014
v	Nos. 308647 308648 308649 308650
LAWRENCE EDWARD REED, Defendant-Appellant.	Clare Circuit Court LC Nos. 11-004237-FH 11-004238-FH 11-004239-FH 11-004240-FH

Before: RONAYNE KRAUSE, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

In these four cases, consolidated below and on appeal, defendant appeals as of right from his convictions of two counts breaking and entering a building with intent to commit a felony or larceny, MCL 750.110, one count of attempt to commit that crime, MCL 750.92(2), two counts of conspiracy to commit that crime, MCL 750.157a(a), two counts of attempt to conspire to commit that crime, MCL 750.92(2) and MCL 750.157a(a), four counts of malicious destruction of property in the amount of $200 or more but less than $1,000, MCL 750.380(4)(a), one count of larceny from a building, MCL 750.360, and one count of conspiracy to commit the latter crime, MCL 750.157a(a). The trial court sentenced defendant, as a habitual offender fourth, MCL 769.12, to serve concurrent terms of imprisonment of 114 months to 30 years for each of the breaking and entering, conspiracy, and larceny convictions, and one of the attempted conspiracy convictions, 114 months to 15 years for each of the remaining attempt convictions, and one year for each of the malicious destruction convictions. We affirm defendant's convictions, but remand for resentencing.

I

This case arises from a series of break-ins, or attempted break-ins, which took place in Clare County early in the morning of November 16, 2010. The prosecutor's theory of the case was that defendant and Thomas Smith drove from the Detroit area to Clare County to break into

gas stations and party stores to steal lottery tickets and cigarettes. The defense maintained that a botched investigation caused defendant to be misidentified as Smith's accomplice.

Smith pleaded guilty in the matter, as well as to similar crimes committed in several other counties, and admitted that he was testifying in this case as part of a plea agreement. According to Smith, defendant, whom he had known for over 20 years, telephoned him and proposed that they "take a ride" or "hit a lick," which Smith understood from experience to mean break into some businesses to steal cigarettes that they would in turn sell.

Smith testified that he picked up defendant in Detroit, and the two of them then went to Clare County, where they hoped that the rural population and reduced reliance on burglar alarms would provide some opportunities to break and enter. Smith testified that they broke the window of a party store and left the area for a short time to see if they drew any attention. Smith explained that, when they returned, a car had appeared at the party store, causing them to move on to another store. Smith testified that, at that store, when they broke a window, an alarm sounded and they fled.

The third target, according to Smith, was another party store, where defendant broke out a window with a hammer and the two men began filling large garbage bags with whiskey and cigarettes, but then fled as an alarm became progressively louder. Smith further testified that the final target that night was a store where they broke a window, then after a short delay, entered and loaded large quantities of tobacco products and lottery tickets into garbage bags.

Smith testified that, while heading back to Detroit, defendant scratched lottery tickets, keeping the winners and discarding the losers, and the two stopped at a combination gasoline station and food market in St. Johns, where Smith brought in some lottery tickets he hoped to redeem for cash. The cashier showed some hesitation, however, so Smith left the store and returned to the car with defendant. Then, two police officers arrived. The officers testified that Smith and defendant drove off at high speed while they gave chase. Ultimately, the fleeing vehicle went off the road and down an embankment. Defendant and Smith then fled on foot, but the police officers succeeded in apprehending them and taking them into custody. One officer testified that defendant threw down some lottery tickets while attempting to flee on foot.

II

Defendant, both through appellate counsel and in his own Standard 4 brief, argues that the trial court erred in denying his motion to dismiss the case because of violation of his right to a speedy trial. In reviewing a trial court's decision on a motion to dismiss on grounds of violation of the right to a speedy trial, the trial court's factual findings are reviewed for clear error, but the application of constitutional law is reviewed de novo. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997).

Our federal and state constitutions recognize the right of a criminal defendant to a speedy trial. US Const, Am VI; Const 1963, art I, § 20. See also MCL 768.1; MCR 6.004(A). Claims of violation of the right to a speedy trial are evaluated on the basis of four factors: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006).

Not in dispute is that defendant consistently asserted his right to a speedy trial. However, appellate counsel charges the Clare County criminal justice system with delays adding up to, by our count, 271 days. This is far less than the 18 months that our Supreme Court has identified as triggering a rebuttable presumption of prejudice. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972). Defendant thus bears the burden of proving prejudice. *Id.*

Appellate counsel concedes that the defense was in no way prejudiced by the delay. Conversely, defendant, in his Standard 4 brief, in asserting prosecutorial misconduct, asserts that the prosecution deliberately delayed the proceedings in order to gain a tactical advantage. However, defendant does not specify what delays were prompted, what unfair advantage the prosecution thereby gained, or what disadvantage was the defense thereby suffered.

Because the pretrial delay at issue fell far short of the 18 months that triggers a presumption of prejudice, and because defendant fails to show any prejudice resulting from the delay, the trial court did not err when it denied defendant's motions to dismiss the case predicated on pretrial delay. See *People v Daniel*, 207 Mich App 47; 523 NW2d 830 (1994).

III

Appellate counsel and defendant in his Standard 4 brief both argue that defendant is entitled to a new trial because he was denied the effective assistance of trial counsel. In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether "counsel's performance was deficient in that it fell below an objective standard of professional reasonableness," and (2) whether "there is a reasonable probability that the outcome of the trial would have been different but for counsel's performance." *People v Roscoe*, 303 Mich App 633, 643-644; 846 NW2d 402 (2014). Defense counsel possesses "'wide discretion in matters of trial strategy,'" *People v Dunigan*, 299 Mich App 579, 584; 831 NW2d 243 (2013), quoting *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and defendant must provide evidentiary support overcoming the presumption of trial strategy and excluding "hypotheses consistent with the view that his trial lawyer represented him adequately." *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

A

Appellate counsel's sole basis for asserting that trial counsel was ineffective is trial counsel's failure to object to portions of the prosecutor's rebuttal argument intended to downplay the significance of one aspect of Smith's plea agreement.

In closing argument, defense counsel, in urging the jury to consider Smith's dire incentives to testify in accord with the prosecutor's wishes, emphasized that Smith faced a potential life sentence for his convictions of breaking and entering, but that his plea agreement resulted in a minimum sentence of just five years. The prosecutor then retorted as follows:

> [Defense counsel] goes on, he was gone from life to five years, no, no, he plead[ed] as a habitual offender fourth, which takes the penalty for his crime of

> life to any term of years, any term of years up to life. The judge gets to set that penalty.
>
> I can tell you today that nobody committing a B&E is gonna get a life in jail. They just aren't. It doesn't happen. That's misleading you right there—entirely misleading you.

As appellate counsel points out, breaking and entering a building with intent to commit a felony or larceny, which carries a maximum sentence of ten years for first offenders, MCL 750.110, can indeed bring a life sentence when the offender, like Smith, is convicted as a habitual offender fourth, see MCL 769.12(1)(b). Appellate counsel further shares some original research to show that, at the time, there were actually two inmates serving life sentences for convictions under MCL 750.110.

It is improper for a prosecuting attorney to offer the jury a misstatement of fact or law. *People v Grayer*, 252 Mich App 349, 357; 652 NW2d 818 (2002); See *People v Warren*, 65 Mich App 197, 201-202; 237 NW2d 247 (1975). The prosecutor in this case ran afoul of this principle by arguing that a life sentence for breaking and entering *never* happens when it may have been more accurate to argue that it *rarely* happens. But where the prosecutor, in the same argument, acknowledged that life sentences were legally within the realm of possibility for a defendant in Smith's situation, the prosecutor's misstatement did not cause defendant prejudice. Moreover, defendant has not provided any evidentiary support to overcome the presumption of strategy in trial counsel's failure to object. *Ginther*, 390 Mich at 443; *Hoag*, 460 Mich a 6; see *People v Bahoda*, 448 Mich 261 n 54; 531 NW2d 659 (1995) ("there are times when it is better not to object and draw attention to an improper comment.").

B

In his Standard 4 brief, defendant argues that trial counsel was ineffective for failing to investigate the seizure of evidence, particularly the lottery tickets Smith attempted to redeem, or call and confront at trial a police officer involved in the retention of that evidence. Counsel's decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To overcome that presumption, a defendant must show resulting prejudice. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). The record established that Smith and defendant stole lottery tickets and Smith attempted to redeem the stolen tickets at a gas station in St. Johns. Defendant has failed to establish that further investigation or testimony at trial regarding the seizure of the lottery tickets would have resulted in a different outcome. Therefore, defendant cannot establish ineffective assistance of counsel.

IV

Defendant next argues that the trial court erred by precluding defense counsel from questioning a witness regarding how many African-Americans she knew. We conclude that any error was harmless. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002).

> If a reviewing court concludes that a trial court erred by excluding evidence, under MCL 769.26 the verdict cannot be reversed "unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." [*People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010), quoting MCL 769.26.]

The owner of one of the targeted stores testified that the incident had been recorded on video, and identified defendant as the person depicted entering the store. On cross-examination, defense counsel elicited testimony that the store owner had watched the video "over and over," and that it showed a black man, who was wearing a hat. Defense counsel asked, "How many black people do you know, ma'am?" Following the prosecutor's objection, the trial court sustained the objection, concluding the question was irrelevant. We note that no expert on cross-racial identification was offered in this case. On appeal, defendant cites articles in legal journals that assert that witnesses generally have difficulty in identifying people of different races, and argues that the trial court erred in refusing to allow trial counsel to identify and expose any such weakness in this instance. Even if defendant could establish that the number of black people the store owner knew had any relevance to her ability to identify defendant on the video, the exclusion of that evidence was harmless. MCL 769.26. The jury had the opportunity to review the video and make its own determination regarding whether defendant was the person who the camera captured entering the store.

V

Defendant also claims the trial court erred by admitting testimony from the cashier to whom Smith had presented the stolen lottery tickets that indicated that defendant was involved in a similar, prior incident. We disagree. A defendant alleging an unpreserved claim of error must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Our Supreme Court has identified the major hazard attendant to introducing evidence that a criminal defendant committed other acts beyond what is at issue at trial:

> When a juror learns that a defendant has previously committed the same crime as that for which he is on trial, the risk is severe that the juror will use the evidence precisely for the purpose that it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he did it before he probably did it again. [*People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998) (internal quotation marks and citation omitted).]

But here, trial counsel elicited the challenged testimony. "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (internal quotation marks and citation omitted), disapproved in part on other grounds 469 Mich 967 (2003).

On direct examination, the cashier testified that he had recognized Smith from an earlier incident involving two men, but clarified that only Smith came into the store with lottery tickets on November 16. A black man, the cashier could not identify, remained in the car. On cross-

examination, trial counsel asked ". . . one man came into the store to cash the lotto ticket?" And then, "So, so, so what the jury needs to know today is did two people come into the store to present these tickets or just one?" The cashier replied, "The second time just one person come [sic] into the store." When trial counsel continued to ask who came into the store on November 16, the cashier answered that Smith came into the store and a black man sat in the car. Defense counsel persisted, "So when you were testifying earlier were you meshing the two incidents together, we need to make sure that the jury is clear on that you are not meshing the two incidents together?" The witness responded, "I guess to make things clear, I saw . . . [t]his man here, come in the first time with [Smith] returning tickets."

The trial court ruled that defense counsel had opened the door to the testimony about defendant's involvement in the prior incident involving Smith by persisting with questions about it even after the witness had clearly testified that he confronted only Smith on November 16, and could not identify the black man in the car.

We agree that the record shows that trial counsel persistently questioned the cashier to distinguish the incident at issue from some earlier one, to the point where the witness finally clarified that on an earlier occasion he saw "[t]his man here," apparently identifying defendant, "come in the first time with [Smith] returning tickets." Because that testimony was the direct result of trial counsel's own questioning, it does not require reversal. See *Gonzalez*, 256 Mich App at 224.

VI

Defendant argues that the trial court abused its discretion by precluding testimony from a police sergeant that he had testified mistakenly in another case in another county that Smith said he and defendant participated in a breaking and entering in that county, but Smith actually said he participated with someone else. Trial counsel maintained at trial that evidence of this mistake would support defendant's theory of a botched investigation and mistaken identity in the instant case. The prosecutor argued the proposed testimony was inadmissible hearsay and irrelevant. The trial court did not abuse its discretion by resolving the argument in favor of the prosecution.

Evidence that tends to show bias on the part of a witness is always relevant, thus admissible. See *Martzke*, 251 Mich App at 290-292. But trial counsel was trying to show a mistake, not bias, and the proposed testimony did not relate to the police sergeant's reputation for truthfulness under MRE 608. Similarly, the proposed testimony was not inconsistent with anything the police sergeant said at trial. Thus, it would not have been admissible under MRE 801(d)(1)(A). Because the proposed testimony concerned a different case, related to the police sergeant's credibility only, not the elements of the crimes for which defendant was on trial, and it was not offered to show bias, inconsistency, or reputation for truthfulness, the trial court's decision to preclude the testimony did not fall outside the range of principled outcomes. See *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2008).

VII

Defendant alternatively argues that the trial court erred in scoring the sentencing guidelines. We conclude the trial court did not clearly err by finding defendant was a leader in a

multiple-offender situation when it scored 10 points for Offense Variable (OV) 14, but agree that the trial court clearly erred by finding that there were four victims and improperly scored 10 points for OV 9.

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

A

The trial court assessed 10 points for OV 14 because defendant was the "leader in a multiple offender situation." MCL 777.44(1)(a). A multiple-offender situation is "a situation consisting of more than one person violating the law while part of a group." *People v Jones*, 299 Mich App 284, 287; 829 NW2d 350, vacated in part on other grounds, 494 Mich 880 (2013). A leader is "a person or thing that leads" or "a guiding or directing head, as of an army or political group." *People v Rhodes*, 305 Mich App 85; ___ NW2d ___ (2014); slip op at 2. To determine if a defendant played a "precipitating role" in the criminal transaction, *id.*, the entire criminal transaction must be evaluated. MCL 777.44(b); *People v Lockett*, 295 Mich App 165, 184; 814 NW2d 295 (2012).

In this case, the trial court stated, "it was pretty clear from the testimony from Mr. Smith[] that [defendant] is the one that called him up, and started this whole thing . . . putting the wheels in motion even though Mr. Smith was the one with the car . . . . [I]t's pretty clear from the testimony that [defendant] called 'em up and said lets go up and hit a lick . . . ." The trial court thus concluded that, by calling Smith to ask if he wanted to "hit a lick," defendant was the initiator of the crime spree, and thus assumed a leadership role. Although defendant cites evidence of Smith's role in the criminal transaction, including the facts that he drove and attempted to redeem the lottery tickets, these facts alone do not establish by a preponderance of the evidence that Smith played a precipitating role, but rather suggest nothing more than the offenders' division of labor. The trial court's finding that defendant was a leader in a multiple-offender situation was not clearly erroneous. *Hardy*, 494 Mich at 438.

Defendant claims that it was nevertheless error to score 10 points for OV 14 because he maintains that Smith was also scored as a leader. See *Rhodes*, 305 Mich App 85; slip op at 1 (where two offenders were involved in a multiple offender situation, only one individual may be considered a leader for purposes of OV 14). Defendant did not preserve this argument at sentencing, in a motion for resentencing, or in a proper motion to remand filed in this Court. MCL 769.34(10); MCR 6.429(C); *People v Jones*, 297 Mich App 80, 83; 823 NW2d 312 (2012). Defendant cannot establish plain error affecting his substantial rights because the only evidence supporting his claim that Smith was scored 10 points for OV 14 is a sentencing information report for Smith attached as an exhibit to defendant's brief, which was not signed by a judge and is not part of the lower court record. This Court will not consider unlawful attempts to expand

the record on appeal. MCR 7.210(A)(2); *People v Powell*, 234 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Again, on the record before us, it was not clearly erroneous to conclude defendant, who initiated the crime spree, was the leader. Smith did not file an application for leave to appeal to challenge his sentence, and whether he was properly scored for OV 14 is not before this Court.

B

The trial court assessed 10 points for OV 9. MCL 777.39(1)(c) provides that OV 9 is scored 10 points if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." The trial court reasoned that "this was all done on one night where they hit four different victims." Our Supreme Court has held that it is error for a trial court to consider "the entire criminal transaction" when scoring OV 9. *People v McGraw*, 484 Mich 120, 122; 771 NW2d 655 (2009). Rather, OV 9 "must be scored giving consideration to the sentencing offense alone[.]" *Id.* In this case, the trial court determined that there was a single victim connected with each business that defendant and Smith targeted. Therefore, no sentencing offense involved more than one victim. As the prosecution concedes, the 10-point score for OV 9 was erroneous, and because the scoring error alters the appropriate guidelines range, resentencing is required. *People v Bowling*, 299 Mich App 552, 563; 803 NW2d 800 (2013).

VIII

Defendant, in his Standard 4 brief, argues that prosecutorial error denied him a fair trial. Defendant's allegations are unpreserved and reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763. Relief is not warranted unless a timely objection "could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (internal quotation marks and citation omitted).

Defendant first asserts that the prosecutor withheld exculpatory information in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), by failing to disclose an incident report until the beginning of trial.

> In order to establish a Brady violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Chenault*, 495 Mich 142, 151; 845 NW2d 731 (2014).]

Even if defendant correctly asserts that the prosecutor withheld evidence, defendant cannot establish that the evidence was favorable under *Brady*. Defendant claims that the officer who apprehended Smith, Nicholas Klaver, stated in a report that defendant threw lottery tickets when running from the police and, because Klaver did not mention this fact at trial, the report could have been used to impeach him. But review of the report demonstrates that Sergeant Jeffrey

Clarke actually authored the report and stated that defendant threw lottery tickets when running from Clarke. Clarke testified accordingly at trial. Therefore, the report was not impeaching evidence that could have been used against Klaver.

Second, defendant claims the prosecutor failed to conduct fingerprint analysis on the physical evidence and, for that reason, the investigation fell short of implicating defendant in any criminal activity. However, defendant cites no authority for the proposition that the police may never consider an investigation complete without identifying a suspect with fingerprint analysis. Moreover, failure to preserve evidence that may have exonerated the defendant will not constitute a denial of due process unless bad faith is shown, and defendant has not alleged bad faith. See *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

Defendant next characterizes his argument of having been denied his right to a speedy trial as prosecutor error. Again, because defendant specifies neither what delays were arranged by the prosecutor to gain a tactical advantage, or put the defense as some unfair disadvantage, defendant fails to show that relief is warranted. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

Defendant last alleges as prosecutor error the prosecutor's statements about the value of Smith's plea agreement, as we discussed earlier in Section III(A). Because we conclude that the prosecutor's argument had little potential to cause defendant any prejudice, defendant cannot establish plain error affecting substantial rights. *Carines*, 460 Mich at 763. A timely instruction could have cured any error. See *Unger*, 278 Mich App at 234-235. That minor irregularity does not compel reversal. See *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992) (a criminal defendant is entitled to a fair trial, not necessarily a perfect one).

IX

Defendant, in his Standard 4 brief, argues that the prosecution failed to present sufficient evidence to support his convictions, and that an injustice has resulted because defendant is actually innocent of the charges. Again, we disagree.

A challenge to the sufficiency of the evidence to support a conviction raises a question of law, calling for review de novo. *People v Medlyn*, 215 Mich App 338, 340-341; 544 NW2d 759 (1996). When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). "[I]t is well settled that this Court may not attempt to resolve credibility questions anew." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

The accounts of a single witness can suffice to persuade a jury of a defendant's guilt beyond a reasonable doubt. See *People v Jelks*, 33 Mich App 425, 432; 190 NW2d 291 (1971). In this case, Smith's detailed testimony provided the jury with a sufficient basis to conclude that defendant was guilty of the criminal conduct relating to the four targeted businesses. The accounts of the police officers who chased and apprehended defendant and Smith after the

unsuccessful attempt to redeem some of the stolen lottery tickets supported Smith's testimony and demonstrated defendant's consciousness of guilt. *Unger*, 278 Mich App at 226. Although defendant suggests that a lack of fingerprint analysis invalidated the testimony that he had run from the police and discarded some lottery tickets, this Court will not second-guess the jury's determinations regarding the weight or credibility of the evidence. *Id.* at 222.

X. CUMULATIVE ERROR

Defendant argues that, even if any single error in the proceedings below does not compel reversal, the cumulative effect of all the errors requires reversal. See *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). However, the only error that this appeal has brought to light was defense counsel's exaggeration suggesting that Smith traded a life sentence for a one to five-year sentence when he agreed to testify against defendant, and the prosecutor's nearly opposite exaggeration suggesting no defendant ever serves a life sentence for a conviction of breaking and entering a building with intent. Because we conclude there was not more than one error, defendant's cumulative error argument is without merit.

XI

We affirm defendant's convictions, but remand for resentencing. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens